Filed 1/8/09 Walters v. Weidman CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

KATHERINE WALTERS et al., Plaintiffs and Respondents, v. GEORGE V. WEIDMAN, Defendant and Appellant.	B203082 (Los Angeles County Super. Ct. No. BC351394)

APPEAL from a judgment of the Superior Court of Los Angeles County, Mark Mooney, Judge. Affirmed.

Law Offices of Mark S. Novak and Mark S. Novak for Defendant and Appellant.

Leviton Law Group and Stuart L. Leviton for Plaintiffs and Respondents.

Defendant George V. Weidman appeals from the judgment entered in favor of plaintiffs Katherine Walters and William Weidman[1] based upon breach of an oral contract. George contends the jury committed misconduct in reaching a compromise verdict, the verdict is not supported by substantial evidence, and it was error to admit Katherine's testimony regarding conversations that took place pursuant to a mediation. We affirm.

Procedural History

In separate but nearly identical complaints consolidated for trial, Katherine and William alleged that George filed multiple actions challenging the estate plan of their deceased stepfather, Walter W. Spengler (Spengler). Katherine and William are George's siblings, but were not parties to George's actions. In April 2007, George entered into a written stipulation to resolve the Spengler actions. Katherine and William also signed the stipulation. George asked Katherine to sign the stipulation in consideration for his oral promise that she would receive one-third of George's settlement. George asked William to sign the stipulation in return for his oral agreement that William should not "worry" because George would "take care" of him following the settlement. In a later conversation, George confirmed his obligation to share the settlement with William, causing William to believe he would receive one-third of the proceeds.

In their first cause of action, Katherine and William alleged that George breached his oral contract to share one-third of the settlement proceeds with each of them. George has received all amounts due under the settlement, but breached his oral promise by failing to pay the amounts due to his siblings. Katherine and William also alleged causes of action for constructive trust and money had and received.

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[1] For purposes of clarity, we refer to the parties by their first names in this opinion.

The Verdict and Motion for New Trial

The jury returned a verdict finding that George breached a contract to share the settlement proceeds with Katherine and William. The jury awarded Katherine and William damages in the amount of $100,000, plus 25 percent each of any future settlement proceeds. Judgment was entered on the verdict.

George moved for a new trial, arguing there was an impermissible compromise verdict, the jury committed misconduct, the evidence was insufficient to support the verdict, and the verdict was contrary to the law. Relying on Code of Civil Procedure section 657,[2] George argued the only oral agreement alleged was for an equal one-third split among the siblings, but the jury instead awarded 25 percent of the settlement each to Katherine and William, leaving 50 percent for George. George relied upon the declaration of Juror Audrey S. to establish the compromise nature of the verdict.

The motion for new trial was denied. The trial court noted it had never received a motion for new trial in which the defendant claimed the plaintiff was not awarded enough damages. The trial court reasoned that jurors could have determined there were two sides to the dispute, and divided the siblings share of the estate evenly between George on the one hand, and Katherine and William on the other. The verdict did not need to make perfect sense in order to avoid a new trial.

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[2] All statutory references are to the Code of Civil Procedure, except as otherwise indicated.

FACTS

Stipulated Facts Prior to Trial

Emily Spengler was the mother of the parties to the instant lawsuit. Spengler and Emily executed a living trust in 1996. The Spengler's 1996 trust left one-third of their estates each to Katherine, William, and George, with the exception for small gifts to Spengler's two children. Emily died in 2001.

Also in 2001, Spengler executed a new trust, leaving one-third of the estate to George, except for two small gifts and 51 percent of the corporate stock in Heritage Hotel Corporation. Katherine and William were left nothing under the 2001 trust.

In 2003, Spengler amended his trust to leave $1,000 to each of his stepchildren, with the bulk of the estate left to others. Spengler died in 2004 with an estate valued at $6.3 million.

In April 2005, George wrote a letter to Katherine, confirming her agreement to attend mediation. He thanked her for her help, adding that "hopefully, we will all benefit from this mediation." Neither Katherine nor William brought an attorney to the mediation. George was represented by two attorneys.

In February 2006, pursuant to the stipulation to settle George's legal actions, George received a first distribution of $618,904. After payment of attorney fees and costs, George received $426,502.07.

Plaintiffs' Case

William testified that after Spengler died, he and George discussed Spengler's will. George said he was going to challenge the will. William helped find a probate lawyer, Jan Anderson of Anderson and Anderson, to represent George.

Tom Marty had worked for Spengler and as Spengler's health deteriorated, Marty took over more business responsibilities. In various conversations prior to mediation on George's lawsuits, George told William three or four times that he would take care of William, meaning they would share whatever money George won. George asked William to attend the mediation, because he wanted him and Katherine there to show a united family front.

William did not have an attorney at the mediation. He never talked to Anderson about representation, nor did he speak to any other attorney. He believed he could not sue a trust and that Spengler could do what he wanted with his estate. He signed the stipulation at the end of mediation but did not read it and did not receive a copy. He fully expected to be taken care of after the mediation, but he has not received anything.

Katherine testified she had not spoken to George in years when he called to talk to her about Spengler's estate. George said he was suing and had an attorney, Anderson. He wanted Katherine to write a letter to Anderson about the family so she would know the situation. Katherine wrote to Anderson as George requested.

George asked Katherine to attend the mediation. He gave Katherine Anderson's number to call. He said he was going to fight this and they are going to share equally. She believed they would share equally based on his statement. Anderson did not agree to represent Katherine; she was unrepresented at the mediation. George wrote her a letter thanking her for the help stating, "and hopefully, we will all benefit from the mediation." Katherine thought the letter verified they would share equally.

Katherine attended the day-long mediation, and at the end, she signed the stipulation without reading it. She signed it under duress and did not receive a copy. She received a copy from Anderson a few days after the mediation. Right after the mediation, George twice told her, "Don't worry, I will share with you, because I'm no schmuck." She believed she would receive a share of the settlement proceeds.

Katherine called George three times after the mediation, but he did not return her calls, and she never received any money from the settlement. She told her son what

happened and she hired an attorney. Her lawsuit against George did not allege duress. The stipulation included a release; she hired her attorney to set aside the release.

George testified that he believed he and his siblings would be treated equally before Spengler's death. He did not believe Spengler's final estate plan was fair and he decided to challenge it. William helped him find an attorney and obtain the death certificate. He felt it would be better if the three siblings acted in concert, although he did not call Katherine before filing suit. He wrote a letter to her on April 14, 2005, thanking her for her help and expressing the hope that they all would benefit from the mediation. He hoped she would make a deal with Marty, as well as her brother.

George invited Katherine and William to the mediation because Marty's attorney wanted them there. Eventually, a settlement was reached.

The settlement stipulation reflects that it includes the interests of George, Katherine, and William. George denied an agreement was made before the mediation to share with his sister and brother. He agreed to give William $1,000, but that was his only promise.

He received a check dated January 31, 2006, for $618,904 through his attorney. He did not return Katherine's call because it was very irritating and curt. She was not due anything from the settlement. He expects to receive additional money. He will receive 27 percent of additional money received by the estate, less one-third for his attorney fees.

Keith Rouse represented Marty at the mediation. He never discussed with Anderson who would attend, including Katherine and William. He was surprised to see them at the mediation.

Defense Case

George further testified that he did not promise to share anything with his sister. He told his brother it was wrong for Marty to get 90 percent of Spengler's estate because

he was just an employee who was well paid. He told William they should all sue in concert. His brother helped find Anderson. William did not file a lawsuit because he was told he could not sue a trust and he had no money to sue.

George also told Katherine he had filed a lawsuit and that they should all file, but after talking to Anderson, his sister decided against it. He made no promises to her because he did not know if his lawsuit would be successful. He denied making a statement containing the word "schmuck," because that word is not in his vocabulary.

Anderson testified she was George's attorney against Marty. She filed actions for George, which went to mediation on April 27, 2005. Rouse told her he was not sure his client would settle unless Katherine and William attended. Anderson suggested to George that his siblings attend.

Anderson had refused to represent Katherine in the lawsuit, but she urged her to get her own attorney. She did not want Katherine and William at the mediation as they were not part of the lawsuit. They signed the stipulation, which included their rights.

DISCUSSION

I

Compromise Verdict

Citing section 657, George argues the verdict should be vacated based upon jury misconduct as set forth in the declaration of Juror Audrey S. George contends her declaration, as well as the verdict itself, establish that there was an impermissible compromise verdict.

A. Standard of Review

"The authority of a trial court in this state to grant a new trial is established and circumscribed by statute. (See *Diamond v. Superior Court* (1922) 189 Cal. 732, 736.)

Section 657 sets out seven grounds for such a motion: (1) 'Irregularity in the proceedings'; (2) 'Misconduct of the jury'; (3) 'Accident or surprise'; (4) 'Newly discovered evidence'; (5) 'Excessive or inadequate damages'; (6) 'Insufficiency of the evidence'; and (7) 'Error in law.'" (*Oakland Raiders v. National Football League* (2007) 41 Cal.4th 624, 633.) "[W]hen a party appeals the *denial* of its motion for a new trial following entry of final judgment, the appellate court must independently review the trial court's determination of whether a defendant was prejudiced by juror misconduct. (*People v. Callahan* (2004) 124 Cal.App.4th 198, 209; see also *ABF Capital Corp. v. Berglass* (2005) 130 Cal.App.4th 825, 832 ['When the court has denied a motion for a new trial, however, we must determine whether the court abused its discretion by examining the entire record and making an independent assessment of whether there were grounds for granting the motion.'].)" (*Whitlock v. Foster Wheeler, LLC* (2008) 160 Cal.App.4th 149, 158.)

A verdict may be impeached by a lone juror's affidavit establishing misconduct. (Evid. Code, § 1150;[3] see *People v. Hutchinson* (1969) 71 Cal.2d 342, 346-349.) "Although Evidence Code section 1150, subdivision (a) permits a court to receive otherwise admissible evidence about matters that may have influenced a verdict improperly, it limits the evidence as follows: 'No evidence is admissible to show the effect of such statement, conduct, condition, or event upon a juror either in influencing him to assent to or dissent from the verdict or concerning the mental processes by which it was determined.' Thus, 'when a juror in the course of deliberations gives the reasons for his or her vote, the words are simply a verbal reflection of the juror's mental

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3 Evidence Code section 1150 provides as follows: "(a) Upon an inquiry as to the validity of a verdict, any otherwise admissible evidence may be received as to statements made, or conduct, conditions, or events occurring, either within or without the jury room, of such a character as is likely to have influenced the verdict improperly. No evidence is admissible to show the effect of such statement, conduct, condition, or event upon a juror either in influencing him to assent to or dissent from the verdict or concerning the mental

processes. Consideration of such a statement as evidence of those processes is barred by Evidence Code section 1150.' (*People v. Hedgecock* [(1990)] 51 Cal.3d [395,] 419.)" (*People v. Lewis* (2001) 26 Cal.4th 334, 388-389.)

B. The Juror's Affidavit

Juror Audrey S.'s declaration stated that at the beginning of deliberations, at least two jurors believed Katherine and William should receive nothing because they did not believe there was an oral agreement to share the settlement. Other jurors believed there was an oral agreement for each sibling to receive one-third of George's settlement. Finally, other jurors believed there was an implied promise by George to share his settlement, but Katherine and William had not done as much as they should to claim their inheritance, so they should get something, but less than one-third. Someone suggested that the differences be compromised by giving Katherine and William 25 percent and the remaining 50 percent to George. All jurors agreed to the compromise, which became the jury's verdict.

C. The Trial Court's Ruling and De Novo Review

After considering argument from the parties, the trial court commenced its ruling by stating that "with any motion for new trial, we really don't want to get into the deliberative process of jurors." The trial court's observation regarding the impropriety of consideration of the jurors' subjective beliefs was consistent with Evidence Code section 1150 and pertinent case law. Although the trial court did not expressly mention Evidence Code section 1150 in its ruling, its intent to rely on the reasoning of the statute is apparent. Indeed, the trial court thereafter made no reference to Juror Audrey S.'s

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processes by which it was determined. [¶] (b) Nothing in this code affects the law relating to the competence of a juror to give evidence to impeach or support a verdict."

declaration, an indication that the court considered its contents inadmissible for purposes of impeaching the jury's verdict.

On de novo review, we hold the trial court properly rejected Juror Audrey S.'s recitation of statements by other jurors, and her conclusion as to what jurors meant and thought. The declaration "dealt only with jurors' mental processes and reasons for assent or dissent and was inadmissible for purposes of undermining the verdict. [Citations.]" (*Sanchez-Corea v. Bank of America* (1985) 38 Cal.3d 892, 910.) The affidavit was not a legally permissible means of establishing a compromise verdict.

We turn to the issue of whether the record, independent of the juror's declaration, establishes there was an impermissible compromise verdict. We hold there was not.

"When the issue of liability is sharply contested, and the jury awards inadequate damages, the only reasonable conclusion is the jury compromised the issue of liability, and a new trial is required. (*Rose v. Melody Lane* (1952) 39 Cal.2d 481, 488-489.) A divided verdict provides further indicia there was a compromise. (*Wilson v. R. D. Werner Co.* (1980) 108 Cal.App.3d 878, 884.)" (*Shaw v. Hughes Aircraft Co.* (2000) 83 Cal.App.4th 1336, 1346.)

Here, the parties sharply disagreed over whether there was an agreement to share settlement proceeds. However, the damage award was not so woefully low as to indicate a compromise verdict. As we discuss below, there is substantial evidence to support the damages awarded, and the damages are not clearly inadequate. Moreover, there is no indication that the jury was divided. No individual polling took place at the time the verdict was returned, but the jury was polled as a group, and the record does not indicate any dissenting jurors. The verdict form did not provide a means of indicating a divided verdict. Under these circumstances, there is no basis for finding the jury was divided. George, who has the burden on appeal of demonstrating prejudicial error (Cal. Const., art. VI, § 13) has failed to carry that burden.

II

Sufficiency of the Evidence

George next argues the evidence is insufficient to support the verdict because there was no evidence offered to show an agreement to a 50-25-25 percent sharing of the settlement. In addition, George complains the jury did not determine that he should absorb all the attorney fees, although the judgment requires him to do so.

A. Standard of Review

"The jury's verdict was 'against law' only if it was 'unsupported by any substantial evidence, i.e., [if] the entire evidence [was] such as would justify a directed verdict against the part[ies] in whose favor the verdict [was] returned.' [Citations.] '[T]he function of the trial court on a motion for a directed verdict is analogous to and practically the same as that of a reviewing court in determining, on appeal, whether there is evidence in the record of sufficient substance to support a verdict.' [Citations.] Accordingly, we examine the record to determine whether the verdict for plaintiffs was, as a matter of law, unsupported by substantial evidence. In our examination we apply the well established rule of appellate review by considering the evidence in the light most favorable to the prevailing party . . . , and indulging in all legitimate and reasonable inferences indulged in to uphold the jury verdict if possible. [Citations.]" (*Sanchez-Corea v. Bank of America*, *supra*, 38 Cal.3d at pp. 906-907.)

B. Analysis

George is correct that none of the witnesses at trial expressly testified to a division of settlement proceeds that would result in him receiving one-half, and his siblings sharing the remaining half. As the trial court observed, however, it was not "impossible"

for the jurors to have determined that there were two sides to the settlement—George on one side and Katherine and William on the other—and sharing meant that each side would receive half of the proceeds. The trial court's determination is supported by substantial evidence.

"For the breach of an obligation arising from contract, the measure of damages, except where otherwise expressly provided by this code, is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom." (Civ. Code, § 3300.) "While Civil Code section 3301 provides that no damages can be recovered for a breach of contract which are not clearly ascertainable in both their nature and origin, the fact that the amount of damage may not be susceptible of exact proof or may be uncertain, contingent or difficult of ascertainment does not bar recovery. [Citations.]" (*Cal. Lettuce Growers v. Union Sugar Co.* (1955) 45 Cal.2d 474, 486-487.) "The law requires, and properly so, that the fact of damage be proved with reasonable certainty. (Civ. Code, § 3301.) Uncertainty as to the fact of damage, that is, as to the nature, existence or cause of the damage, is fatal. But the same certainty as to the amount of the damage is not required. An innocent party damaged by the acts of a contract violator will not be denied recovery simply because precise proof of the amount of damage is not available. The law only requires that some reasonable basis of computation be used, and will allow damages so computed even if the result reached is only an approximation." (*Allen v. Gardner* (1954) 126 Cal.App.2d 335, 340.)

The evidence regarding sharing of the settlement proceeds was not entirely consistent that each sibling would receive one-third, leaving room for the jury, within reason, to determine the amount of damages suffered by Katherine and William. For example, Katherine testified that George told her he was going to fight the terms of the trust and they were going to "share equally." George wrote her a letter thanking her for her help and stating "we will all benefit from the mediation." After the mediation, George twice told her, "Don't worry, I will share with you, because I'm no schmuck."

William testified that George told him three or four times before the mediation that he would "take care" of him, meaning they would "share whatever money George recovered."

Given the nature of the statements attributed to George, the jury was not obligated to accept the proposition that all settlement proceeds would be split among the three siblings on an equal basis. As case law recognizes, an approximation of damages is permitted if a precise amount of damages cannot be discerned. The jury's determination was not unreasonable, given the record presented.

George received a total of $426,502.07, after attorney fees, as payment for the first part of the settlement. The jury awarded a total of $200,000 to Katherine and William. While the jury verdict was less than an equal split among the siblings, it did not vary to a sufficient degree from that requested by Katherine and William so as to be arbitrary or capricious.

George also argues that the judgment provides that he will receive 50 percent of future settlement proceeds, and Katherine and William will each receive 25 percent, but George will have to pay the entirety of attorney fees. He complains that the jury made no finding that he would be solely responsible for future attorney fees, and it is unfair to allocate that entire burden to him.

However, as Katherine and William point out, it is undisputed that George's attorneys represented only him, and that Katherine and William were unrepresented. The jury's damages award, as to the amount already received by George, allocated the entire responsibility to him for payment of those fees, while at the same time giving him the largest share of the settlement. In view of the jury's allocation of responsibility for attorney fees to George regarding the initial settlement payment, and the uncontested fact that only George had attorneys, the judgment is consistent with the verdict in allocating responsibility for future attorney fees to George.

III

Mediation Confidentiality

A. George's In Limine Motions

George moved in limine to preclude introduction of statements made pursuant to the mediation under Evidence Code section 1119. Specifically, George objected to Katherine's statement that before the mediation George told her the three siblings would share equally in any settlement, and that after the mediation, and again when they walked to their cars, George told her, "Don't worry I will share with you. I am no schmuck." The motion in limine was denied.

"In 1997, the Legislature adopted the California Law Revision Commission's (Commission) recommendations and revised the mediation confidentiality statutes. (*Fair v. Bakhtiari* (2006) 40 Cal.4th 189, 194-196 (*Fair*.) It enacted [Evidence Code] section 1115 et seq., creating an extensive statutory scheme governing mediation confidentiality and its exceptions. (*Fair, supra,* at pp. 194-196.)" (*Simmons v. Ghaderi* (2008) 44 Cal.4th 570, 578.)

"Practitioners and the courts sometimes refer to the confidentiality afforded by statute to communications made in connection with mediation as a 'mediation privilege.' (See, e.g., *Foxgate Homeowners' Assn. v. Bramalea California, Inc.* (2001) 26 Cal.4th 1, 13 (*Foxgate*) [Supreme Court concurs with Court of Appeal's determination that 'parties had also expressly reserved all mediation privileges']; *Eisendrath v. Superior Court* (2003) 109 Cal.App.4th 351, 356 [trial court found an implied waiver of 'mediation privilege in Evidence Code section 1115 et seq.'].) Since the Evidence Code does not use the term 'privilege,' we will use 'mediation confidentiality' in our discussion of the statutory provisions rendering communications made in connection with mediation confidential." (*Stewart v. Preston Pipeline Inc.* (2005) 134 Cal.App.4th 1565, 1572, fn. 5.)

As to the statement before mediation, the reasoning in *Wimsatt v. Superior Court* (2007) 152 Cal.App.4th 137 is instructive. *Wimsatt* held, in part, that a statement made by counsel regarding the settlement value of his client's case, which statement was later referenced in a mediation brief, was not covered by mediation confidentiality, because the moving party had failed to carry its "burden to show that the conversation is protected by mediation confidentiality. To do so, the timing, context, and content of the communication all must be considered. Mediation confidentiality protects communications and writings if they are materially related to, and foster, the mediation. [Citations.]" (*Id.* at p. 160.) "The fact that the conversation . . . occurred outside the presence of the mediator does not automatically foreclose a conclusion that it was protected by mediation confidentiality. [Citations.] However, it is [the moving party's] burden to link the conversation to a mediation session." (*Id.* at p. 161.)

The trial court did not abuse its discretion in ruling the pre-mediation statement admissible. Our review of the record reflects no showing as to the time of the conversation, other than it was prior to the mediation. As the court noted in ruling on the in limine motion to exclude the statement, "It's a little unclear to me actually the context of that statement, based on the motion in limine." The context did not become more clear during trial, as Katherine testified to several conversations occurring over an unspecified period of time, each of which included reference to sharing whatever was won in George's lawsuit. The trial court also noted that it was unclear whether George's offer to share was for the purpose of mediation, or if there was a second part of the conversation that dealt with the mediation.

As the moving party, George had the burden of establishing that the pre-mediation statements were for the purpose of or pursuant to mediation. The trial court's ruling that he failed to establish those critical points was not an abuse of discretion.

As to the conversation after the mediation, it is not covered by mediation confidentiality. The confidentiality rule does not cover conversations "that (1) occurred after the end of the mediation ([Evid. Code,] § 1125) and (2) do not implicate

confidential communications made prior to the end of the mediation ([Evid. Code,] § 1126)." (*Eisendrath v. Superior Court* (2003) 109 Cal.App.4th 351, 365, fn. 8.) The post mediation statements have not been shown by George to implicate confidential communications from the mediation, and therefore the trial court properly admitted the testimony.

DISPOSITION

The judgment is affirmed. Katherine Walters and William Weidman are awarded costs on appeal.

KRIEGLER, J.

We concur:

TURNER, P. J.

MOSK, J.